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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 358.

HOMER E. GRAFTON, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

SUPPLEMENTAL BRIEF ON BEHALF OF PLAINTIFF IN ERROR.

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JURISDICTION.

The Court of First Instance of the Province of Iloilo had no jurisdiction to try the defendant for the offense with which he was charged, because the authority of that court rests wholly upon statute, and by that statute it is precluded from exercising jurisdiction over the place where Grafton was when he acted.

The offense was committed upon a reservation or tract of land in the Philippine Islands "designated by the President for military" purposes. Being so designated, it was excluded from the sweep of the statute giving jurisdiction

to courts of this class by the following language (section 12 of the act of July 1, 1902):

> "That all the property and *rights* which may have been acquired in the Philippine Islands by the United States under the treaty of peace with Spain, signed December 10, 1898, *except such land or other property as shall be designated by the President of the United States for military* and other reservations of the Government of the United States, are hereby placed under the control of the government of said islands, to be administered for the benefit of the inhabitants thereof, except as provided by this act."

Camp Jossman was designated by the President as a military reservation on September 1, 1903, and so is such a tract of land as was in contemplation of the statute-making power when it used the terms "such land * * * as shall be designated by the President," &c.

Thus it is seen that Camp Jossman, the place where the act complained of is alleged to have been unlawfully done by Grafton, is in express terms placed beyond the jurisdiction of the Court of First Instance.

The question of jurisdiction thus presented is raised by the plea to the jurisdiction of the Court of First Instance, which was interposed in that court in the following language:

> "The Court of First Instance has no jurisdiction to try the accused for the offense alleged in the indictment, for that the act constituting the alleged offense was done and committed within the limits of Camp Jossman, a military reservation of the United States, and by a soldier duly enlisted in the Army of the United States, in the line of duty" (R., 2).

In passing upon this plea to the jurisdiction, the Court of First Instance made the following statement of facts and conclusion of law:

> "*The Statement of the Facts:* First I shall find to the effect that the defendant was a soldier; that he was on duty at the time that this offense occurred, and that the point where he was on duty and where the offense occurred was within a military reservation in Guimaras. * * *
>
> "I think the first plea to the jurisdiction of the court must, necessarily, be overruled; that is, the substance of the demurrer that this court has not jurisdiction—that is, a general challenge of the jurisdiction of the court. It is coupled with the proposition that this man was a soldier, and was on duty in the military reservation; but I think under the authorities that have been cited, and under the law that has been passed by Congress constituting this court, that it has the same jurisdiction in matters of this kind that the Federal courts at home have over offenses committed upon a military reservation" (R., 7 and 8).

An exception to this ruling was preserved of record as follows:

> "Captain Nettles asks that the matter of jurisdiction of this court be carried to a higher court before the accused pleads to the merits of the case."

and was disposed of as follows:

> "The COURT: The motion made by Captain Nettles is overruled, and the defendant is ordered to plead. The motion is overruled as a matter of law, not as a matter of discretion. It is the opinion of this court that this case must be finished by final judgment before any part can go to the Supreme Court under the new method of procedure. Of course it will not be necessary for it to go at all, if the defendant is acquitted" (R., 12).

The point was still further preserved of record for consideration by the Supreme Court of the Philippine Islands by the following assignment of error:

"1. The court erred in overruling the demurrer and denial of jurisdiction by the defendant for that:
(*a*) The Court of First Instance has no jurisdiction over offenses committed by officers or enlisted men of the United States army within the limits of a military reservation of the United States" (R., 90).

Authorities cited tending to uphold the jurisdiction of civil tribunals within the confines of the United States proper over offenses committed upon military reservations have no bearing here, because, while it may be conceded that civil tribunals within the United States maintain jurisdiction over civil offenses committed upon military reservations, it is to be remembered that such reservations have been carved out of territory which prior to the establishment of the reservation had been subject to such jurisdiction. In the act of July 1, 1902, establishing a civil government in and for the Philippine Islands, express reservation of jurisdiction with respect to offenses committed upon military reservations was made.

A Constitutional Tribunal for the American Soldier.

Conceding that the Dorr case 195 U. S., 138, establishes the law to be that Congress has the power to fix the status of all people who are the inhabitants of territory acquired by the United States Government before that territory is incorporated into the Union, and that such power has been exercised by Congress with relation to the people of the Philippine Islands, let us hope that the dissenting opinion in the Dorr case does not truly prophesy the all-time attitude of this court; it is suggested that the result of that opinion is bound to be to take from every American soldier who is in the Philippines his right to a jury trial although he is there as a result of orders that he was compelled to obey and not as a result of his own voluntary act. The insistence, by the Government, that a different rule must be

applied to an American citizen-soldier when in the Philippines to that which must be applied to him while in any other part of the nation's dominion seems to be a result that flows from the Government's shrinking from the logic of the situation that actually exists. It is indeed "a condition and not a theory" that confronts us. Despite our desire for the establishment of governmental institutions before which all men shall be equal, the fact remains that the executive portion of the Government, as well as the judicial, recognizes that the people of the Philippine Islands do not possess those characteristics of mind and morals that make it wise to accord to them all the rights that the Constitution gives and guarantees to the American citizen. As was said by Mr. Justice Day in the Dorr case, 195 U. S., 137-148:

> "And while Congress will be expected to recognize the principle of self-government to such extent as may seem wise, its discretion alone can constitute the measure by which the participation of the people can be determined" (Cooley, Principles of Const. Law, 164).

And again:

> "The people [of the Philippines] * * * coerced to accept, in advance of incorporation into the United States, a system of trial *unknown to them and unsuited to their needs.*"

This utterance of this court is susceptible of but one interpretation, namely, that we recognize the fact to be that the Filipino is not possessed of those things necessary to be possessed in order to put a man upon an equality with the average American citizen. From that we must draw the conclusion inevitably that the Filipino is recognized as an inferior race; that the arbitrament of arms proclaimed not only his inferiority in the field, but in every aspect of civil life that has bearing upon government. Now this fact, existing though it does, and by indirection at least recognized by

the courts, should not be employed as an excuse or justification for depriving an American citizen of *his* constitutional privileges. You do not give to the Filipino a jury trial; you establish for him instead of the *nisi prius* court of the common law a Court of First Instance; not because the jury trial is not in itself good, a wholesome judicial institution, the "bulwark of Anglo-Saxton liberty," but because it is an aspect of government for which the Filipino is not fitted, and for no other reason. But the unfitness of the Filipino for the exercise of this privilege does not in any degree diminish the ability of the American citizen to exercise it; and yet if the Government's contention in this regard is to be upheld it must be upheld upon a chain of reasoning like this:

1st. We can give or withhold from the people of the Philippines jury trial.

2d. The Filipino is not fitted to enjoy the privilege of a jury trial.

3d. For this reason we will withhold from him the right of jury trial.

4th. The American citizen *is* entitled, under the Constitution, to a jury trial;

5th. But in the Philippines we will take it from him:

(*a*) Not because he is not an American citizen,

(*b*) Not because he isn't as fitted when in the Philippines to enjoy that privilege as when in the States,

(*c*) Not because it is not the duty of the Government, under the Constitution, to protect every American citizen in his constitutional rights;

(*d*) But because the Filipinos are not fit for it; and for that reason we will not let the American citizen enjoy this right while he is in the Philippines.

If we must have absolute equality before the courts established by the United States Government in the Philippines, is it not better to *level up,* so that the Filipinos shall have a jury trial, even if you doubt his capacity for a proper exercise of that right, rather than *level down,* by taking from the American citizens their constitutional rights, in order to bring them down to the level of the admittedly inferior Filipino. Why not frankly recognize what the Spanish war and the Treaty of Paris have made plain, that there is in the Philippines two races, the dominant and the subject race; that the dominant American, being within the dominion of the United States Government, carries with him to every place where the United States Government, in its civil aspect, controls, certain constitutional rights; one of which is the right of a trial by jury when charged with a felony, in any court erected by the United States Government, which acts only under that Constitution that gives to the citizen this privilege; and in the fulfillment of the Government's constitutional duty in this particular it should make provision for a trial by jury whenever, in such a court, he is charged with an infamous crime. Conditions compel such a situation if the Government would not shirk its duty to its own citizens. Just as the Roman citizens stood on a different footing before the law from the inhabitants of a conquered province, so does the American soldier stationed in the Philippines stand on a different footing from the people of those islands, because the logic of events compels it. Let this fact be admitted and judicially proclaimed, not with a view of being tyrannical, oppressive, or other than kind, but because it is true. Let us see that the Filipino is protected in all those civil rights to which all peoples are entitled: He shall not have taken from him his property or his liberty without due process of law; he shall not be compelled to testify against himself; he shall be privileged to testify in his own behalf when charged with crime, if he chooses; he shall have a speedy

and public trial; charges against him shall be fairly made known to him; but recognizing his inadaptability for the exercise of the right of a trial by jury, we will abstain from giving him that which might prove a bane rather than a blessing. But side by side with this ward of the Government are citizens whose rights are fixed by the very instrument that creates and places limitations on that Government; and among those rights is the right to a jury trial; that cannot be taken from them, even though it is impossible to give the same right to their Filipino neighbor. For years, in England, where the common law was born, the ecclesiastic was tried in another court than that which took cognizance of the layman's offense; and the nobleman could only be tried by the House of Lords or the Court of the Lord High Stewart, for there alone were his peers. So it is seen that such things are not strange to Anglo-Saxon jurisprudence. It is true, that it is the hope of those who love republican institutions and democratic equality, that the promulgation of the Declaration of Independence, that all men are equal, shall some time come to be an admitted fact as well as an exalted political hope. But when dealing with Visayans, Tagalogs, Bicols, Iloconos, Pangasinans, Pampangas, and Cagayans to say nothing of the Mohammedan Moros and the Pagan Igorrotes and Negritos of the Philippine Islands, such a thought is but an "iridescent dream;" and to attempt to enact laws in the Senate House or to mould them in the courts, upon the hypothesis of such equality, is to be academic, perhaps, but certainly not practical. But while all this is so, the constitutional rights of the citizens remain the same; and with regard to those rights and the citizens' relation to them, there is no room in the mind of a wise statesman or righteous judge for debate or argument. Wherever the Government is in power, its duties to the citizens must be performed, and its power in the Philippines is as perfect as it is in the District of Columbia.

It has been said that the right to a trial by jury is a constitutional right, but not a *"fundamental"* constitutional right—that it appertained to procedure and so could be ignored, while other constitutional mandates must be observed. It is respectfully suggested that since this provision for jury trial is a part of the fundamental instrument, the Constitution, it is bound to partake of the characteristics of that instrument, and is fundamental. Are not all parts of the fundamental—the foundation document—fundamental? The root word, from which the adjective comes—*fundus*—means nothing but foundation. The Constitution is the foundation on which the Federal Government rests; and can we say of a part of that foundation, it is not fundamental? One part might seem more important than another, but it is all foundation; it is all fundamental.

The decalogue is the foundation of our religion. What would be thought of the clergyman who taught that the commandment which forbids us to bear false witness against our neighbor only appertained to procedure, and so was not fundamental moral law, and could be disregarded when expediency demanded it without violating ethical proprieties?

Power and Duty.

The duty of the sovereign is coextensive with its power, to accord to the subject or citizen all things that the law of the sovereign gives to the subject or citizen. The United States Government is in supreme control of the Philippine Islands. Those islands are appurtenant to but outside of the United States. The dominion, however, of the United States within them is complete. Just such places as were contemplated by the Constitution makers when they provided that "the trial of all crimes except in cases of impeachment shall be by jury; and such trials shall be held in the State where the said crimes shall have been committed; *but when not com-*

mitted within any State, the trial shall be at ch place or places as the Congress may by law have direc d" (section 2, article III, Constitution of the United States)

The foregoing makes perfectly clear that tl makers of the Constitution had in mind the thought tha a citizen of the United States might be charged with commi ng a crime at some place over which the United States overnment had dominion, but which was outside any State nd accordingly made the foregoing provision. The care with which the right of trial by jury, for the citizen of the U ited States, was guarded by the Constitution makers, and th people who were behind the Constitution makers, is made ear by the foregoing quotation, and also by the sixth an ndment to the Constitution, subsequently adopted. Ther is nothing contained in the reports or opinions of this cou in conflict with the proposition, that it is the duty of the U ited States, wherever it has the power to do so, to see that its izen, when charged with a felony in one of its own courts, all have a jury trial.

Conceding that Congress has power to fix t status of peoples who *never were citizens* of the Unite States and never had any rights as such, no power found in he Federal Government can take from a citizen of the Unite States that which is his birthright, given him by a power ich is behind all Federal government, to wit, the Constitu on.

The Hurtado case (10 U. S., 516) has no b ring upon this proposition, since that is but the recognition the rights of an independent sovereign, to wit, the State o California, to determine its own criminal procedure. T Maxwell case (176 U. S., 581) is a case of the same i ort. The Mankichi case (190 U. S., 197) has no bearing, Mankichi was a citizen of Japan. The Dorr case (195 S., 138) contains in the controlling opinion nothing i icative of hostility to this position, as nowhere in the re rd or the

opinion does it appear whether Dorr was or was not a citizen of the United States, and no position taken by the court was made to turn upon that question.

The case of *in re* Ross (140 U. S., 453), much relied upon by the Government, is without avail as against this contention; because that was a case involving things transpiring and actions by the Government performed in a place beyond the jurisdiction of the United States. It was in Japan. Without the rights given by treaty, an offense against the laws of Japan, if done by an American or another, must have been punished by the laws of Japan. Since the punishing of American citizens or the trying of them, according to the jurisprudence of many foreign countries, would work enormous hardship, such an evil was attempted to be in a measure cured by treaty. The treaty with Japan simply provided that if an American citizen should violate the laws of Japan, he should be tried *in Japan* by a tribunal created by the United States. Under the treaty the United States Government had no right to take the offender outside of Japanese dominion, for if such things were permitted, the government of Japan would never know whether the infractors of its laws, when Americans, were ever punished. They had to be tried in Japan, and with such instrumentalities as were there at hand. As was suggested by this court in that case, the material for an American jury was not available, and consequently the consular court was the best that could be had. It was never thought that the consular court was a fulfillment of a governmental duty to the citizen in a place where the Government had *supreme control;* but it was the best the Government could do in a place where its power was *not* supreme; and the accused's condition was very much better than it was prior to the making of such treaty and the creation of such court. So the Ross case does not in any degree militate against the proposition that where the power of the United States is *complete,* there is its *duty* to its citizens, in ITS OWN

COURTS, when the citizen is charged *with felony,* to see that he has a JURY TRIAL.

Can He Waive His Constitutional Right?

It has been suggested that Grafton, when he enlisted, enlisted with a knowledge of the fact that the law was that in the Philippine Islands, where he might be ordered to go, he could not have a jury trial, if there he was charged with crime; and thus he waived his right to a jury trial while in those islands. We presume that, theoretically, he was supposed to know the law as it was subsequently proclaimed to be in the Dorr case; though it seems a rather violent presumption, in the light of the fact that the members of this court differed so radically on the questions involved in that case; and in the light of the surprise that that adjudication occasioned to many members of the profession admittedly learned. But let us assume that he did know it. The most that can be said is that he waived his right to a jury trial. But this is a thing he cannot do when charged with a felony, as in this case he was. The following authorities are demonstrative of the fact that when charged with felony and arraigned in a Federal court a man who is a citizen of the United States cannot, under the United States Constitution, waive a trial by jury. Now if he cannot waive it when charged and arraigned, is it not approximating the absurd to say: "Yes, that is so; but then he can waive it before he is charged or arraigned"? If he cannot waive it, he cannot waive it; and that he cannot is demonstrated by the authorities here following:

> "It is said that the accused did not object, until after verdict, to a trial jury composed of eight persons, and therefore he should not be heard to say that his trial by such a jury was in violation of his constitutional rights. It is sufficient to say *that it was not in the power of one accused of felony, by consent expressly given or by his silence, to authorize a jury*

of only eight persons to pass upon the question of his guilt. The law in force when this crime was committed did not permit any tribunal to deprive him of his liberty, except one constituted of a court and a jury of twelve persons."

Thompson *vs.* Utah, 170 U. S., 343, at 353-354; Book 42 L. C. P., p. 1067.

"In a criminal case the court cannot direct a verdict of guilty even where the facts are admitted beyond dispute, and the question of guilt or innocence depends wholly upon a question of law which the court must determine."

U. S. *vs.* Taylor, 11 Fed., 470.

Another thought: This is a question of statecraft as well as law. This court must interpret the law with the mind of the enlightened statesman as well as that of the analytical lawyer. The results that are likely to flow from the conclusions reached by this tribunal must be considered. And with that duty before the minds of the justices, will they not think of the effect upon the army that an upholding of the Government's contention is bound to have? Uphold it, and you say to the soldier, A sentence of penal servitude may come to you at the hands of a court some members of which are natives, whose every prejudice, racial and religious, cries out against the man with the magazine rifle, who is the alien master of his country, the foreign ruler of his people. If we surrender our soldiers, whose bayonets alone prop our insular government, to the soldiers' enemies to pronounce judgment upon them, will not contempt for us strangle even wonder in the mind of that enemy? For the Government to offer up the soldier whose sword alone guards it in the Orient as a peace offering to the Filipino is a thing as unjust as it is unwise, the thought of which revolts the judicial conscience. What will be the effect upon the morale of the army? What will become of that resourcefulness, that daring, that soldierly hardihood that has characterized the

American army, if the soldier, while contending with the natives, is obliged to constantly think of his probable betrayal by his own Government? Let the Government placate the Filipino, but do not let it pander to him. If this judgment is permitted to stand, the draft will have to be resorted to to fill the ranks of our army, small as it is. It has been estimated by experienced officers that the effect of this case has already been to prevent the re-enlistment of more than a thousand of the army's best soldiers. The ingratitude of republics is proverbial; but to permit the thing here sought by the Government is to pile the Pelion of thanklessness upon the Ossa of ingratitude with a vengeance. This practical aspect of the matter makes plain that this is a case similar to those Wendell Phillips had in mind when, speaking of the Great Judge, he said: "He saw to it that justice should always be the highest expediency."

Exterritoriality.

Under the Insular cases and the Dorr case and the executive practices with relation thereto, the Philippines are foreign territory, for revenue purposes.

Can it be that it will be held that this territory is foreign in order to accommodate a fiscal convenience, and be held to be *not* foreign in order to take from the citizen-soldier the protection that is his in a foreign land, under the doctrine of exterritoriality?

Let us not forget that he is there on exactly the same mission now that was his, immediately after the battle of Manila, to wit, to keep in subjection the people of the islands and to uphold the sovereignty of the United States. It was then international war; it is now insurrectionary war. But, so far as the larger part of the inhabitants is concerned, it was an enemy's country then and is an enemy's country now.

To hold that the islands are foreign for purposes of finance

and yet not foreign so that it is necessary to deliver the American soldier, a citizen of the United States, naked to his enemies is indeed to pass by the door of the temple of Justice to lay offerings upon the altar of Expediency.

Jury Trial for the Soldier is Practicable in the Philippines.

And the practical working out of the idea of an American jury for the American citizen when in the Philippines need not give us pause. The whole archipelago could be made a single judicial district for this purpose. All might go up to Manila in matters of this kind, as once all England went up to Westminster Hall in matters of Chancery. And there will always be enough Americans in the islands, while our rule obtains, to furnish a jury of his peers for the American prisoner; or what would perhaps be better still, as the existing law of the United States declares that the trial of persons who have committed crimes elsewhere than within a State or an organized judicial district shall be had in the district where the accused shall be found or shall be first brought, why should not our citizens, when charged with felonies alleged to have been committed in the Philippines, be brought to the nearest organized judicial district of the United States, to be there tried in conformity with the constitution?

Unfairness to the Soldier.

But suppose the Government does possess the power to deprive the citizen, whom it has compelled to go to the Philippines, of the right of a jury trial, or that the citizen could waive it, or both; think of the abandon unfairness of sending an American citizen as a soldier to the Philippines for the sole purpose of holding the conquered races in subjection—to suppress insurrection, to be the natives' military

master, and thus compel him to breed for himself in the natives' breasts, hatred and all uncharitableness—and then, when by any misadventure he comes in conflict with these natives, even in the discharge of a military duty, to turn him over to the tender mercies of courts presided over in part by judges who are natives and so his enemies. That this enmity exists will not be questioned by the candid man. Not by the fawner upon power that place may be his—who forgets the conqueror and sees only the patron—can we judge of Filipino feeling; but rather by such horrors as that of Balengigi in Samar, where soldiers' corpses were mutilated unspeakably by the bolo-wielding butchers.

If we are to have a satrapy in the islands, let us not distinguish our satrapy from those of Persia by throwing the soldier, by whom alone that satrapy is made possible, to the boloman or the boloman's judge, as the Russian mother threw her child to the pursuing wolves. She did it to save her life; we can have no better excuse for doing it than to maintain a pleasing political fiction, viz, that Peace sits enthroned in the archipelago, and that the twelve or fifteen thousand soldiers there are there only as a guard of honor, and that to the Mestizo and Tegalo judge the American soldier looks the same as his own brown brother.

Second Jeopardy.

If unhappily the court should conclude that the proposition with respect to the jurisdiction or want of it on the part of the courts of the Philippine Islands to try the accused, by reason of the fact that the offense was committed within the limits of a military reservation, is not sound; and also that the contention with respect to the right of a citizen charged with crime in the Philippines, at the instance of the United States, to be tried by a jury of his peers is also unsound, then it is submitted with confidence that Grafton's plea of immunity from trial before the Court of First Instance by reason of the provision of the Philippine Bill of

Rights (act of July 1, 1902, sec. 5, par. 3), to the effect that "no person for the same offense shall be twice put in jeopardy of punishment," affords incontrovertible ground for reversal of the judgment here complained of.

Meaning of the Judgment.

Let us see what the upholding of this judgment means: It means that an American citizen was induced to enlist in the Army of the United States with the belief that in so doing he was surrendering only one constitutional right, to wit, a trial by jury when before a court-martial. Fine-spun theories may be advanced to establish the legal fiction that he knew differently, but we do not think a candid man will seriously argue that Grafton did not, at the time of his enlistment, suppose that wherever he went he was under the protection of the Government he served and would not be deprived of a jury when charged with felony in any civil court created by his Government.

Having enlisted with this belief, the Government then issues orders compelling him to go to the Philippine Islands. It is a place to which he had no desire to go; where, for a soldier, there was only hardships, enemies, disease, and possible death; but he was obliged to go or be branded as a deserter or imprisoned for insubordination. Being a good citizen and a good soldier, he obeys these orders and goes to the Philippines; he was at Balangigi, in Samar, where forty or fifty of his fellow-soldiers were slain by bolomen and their corpses hacked and mutilated and outraged in a manner that the telling of it would so violate the rules of decency and this court's decorum that the same cannot be here printed. Such a sight would be bound to impress itself upon his mind, and when dealing with natives himself he would do so with recollections that made perfectly clear to him that to take chances of being overpowered by such adversaries was not only no part of a soldier's duty, but would be an act

of egregious folly. With this knowledge of the native character, he is sent with a small detachment of twenty-odd men two or three miles from the main body of his regiment. While there he sees natives manifesting, by their expressions and demeanor, more than their usual unfriendliness, and he sees women of the native village near which he is stationed being conveyed away in boats which return filled with men. He not unnaturally recognizes that such things are the very things that the natives would do if they were contemplating an attack. He recalls that it was just such a small detachment as the one of which he was then a part that was rushed and butchered at Balangigi. He is apprehensive of danger, which apprehension he makes known to his superior officer. Because of this apprehension he loads his rifle when sent to his post that Sunday afternoon. While walking his post he sees two bolomen approaching him; he crosses the road to avoid coming in contact with them. They leave their path and come toward him, and when within a short distance of him one displays a bolo and the two together rush at him; he believes he is in danger. What man of sense, in the light of the foregoing, would not have believed himself in danger? And, under the impulse of self-preservation and in the fulfillment of a manifest soldier duty, he fires two shots in rapid succession and kills these two natives. His commanding officer, unduly anxious to concede jurisdiction to the civil courts, inquires if the civil court desires to take cognizance of the affair, which that court declines to do. The matter is then investigated by the military authorities; all the natives in that vicinity are questioned and all deny knowledge of any of the facts relating to the case; he is then tried by court-martial, duly and lawfully created, and is acquitted. But the natives don't approve of the court-martial and complain of the result, and proceedings are instituted before the Court of First Instance. At that trial it is urged that Grafton has been tried once for this offense, and that plea is overruled. He then asks for a jury of his

peers, suggesting that he is an American citizen, brought to the islands without his volition; that his Government was created by the Constitution; that that same Constitution gave to him this right, and that his Government was in a position to accord to him this right because it was there in power. This appeal is likewise overruled. Then the prosecution brings forward two of the natives, who three months before and within ten days of the shooting had declared that they knew nothing of the matter, and they are put upon the stand and tell a tale that bears every mark of the apocryphal; and on their testimony the judge finds that these two witnesses, with erratic memories, do not tell the truth in certain particulars, yet from their testimony he deduces the conclusion that the bolo-wielding native and his companion were brandishing the weapon and rushing Grafton in a spirit of playfulness—to perpetrate a practical joke, to frighten the soldier and have fun with the Americano. Of course it appeared that Grafton did not know these men, and consequently could not have had a knowledge of their extraordinary notions of a jest, or that rushing at a stranger with a drawn bolo was only a phase of Visayan pleasantry, and not unnaturally supposed that they were trying to kill him, and simply did to them what they apparently intended to do to him, but did it first. This judge also found that Grafton was in the discharge of a military duty; that he was at the post where his orders placed him; that he acted without malice and in good faith; but because his judgment was so bad as not to recognize Filipino fun when masquerading as a murderous assault, and not to see that a drawn bolo was the modern bauble of the licensed jester, he adjudged that Grafton should be sent to the penitentiary for twelve years.

On the appeal to the Supreme Court of the Philippines one American judge with three of his Filipino brethren joined against their three American associates to sustain this infamous judgment.

Is this a tale that can be told with pride by any American or thought of with satisfaction by any American judge?

We will continue to hope, as long as we are permitted to do so, that the judgment complained of will not be permitted to stand.

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